Can a criminal squatter acquire title by adverse possession?

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Criminal entry on to land will not block a claim to title based on adverse possession. Will the new offence aimed at residential squatters prevent such a squatter succeeding with an adverse possession claim?

1. New offence – from 1st September 2012 section 144 Legal Aid Sentencing and Punishment of Offenders Act 2012 makes it an offence to squat in a residential building. Previously section 7 of the Criminal Law Act 1977 made it an offence for a trespasser not to leave having been asked to do so by a "displaced residential owner" or a "protected intending occupier". The new offence applies to all residential buildings whether or not vacant immediately prior to the trespass and whether or not a request to leave has been made.

The elements of the offence set out in sub-section (1) are:-

(a) the person is in a residential building as a trespasser having entered it as a trespasser,

(b) the person knows or ought to know that he or she is a trespasser, and

(c) the person is living in the building or intends to live there for any period.

For these purposes "building" is defined as including a structure or any part. The definition is more limited than in section 7 CLA 1977 and does not include the means of access or gardens. There could be interesting issues with regard to buildings such as dormitories and hotels.

It will not apply if the trespasser had originally been a lessee or licencee and is holding over even if occupation has not been continuous since the expiry of the lease or licence (subsection (2)).

Continuing trespass of a residential building which started before the commencement of section 144 will not be outside the offence (subsection (6)). Consequently the new offence will be a material consideration in cases in which adverse possession of a residential building started before 1st September 2012 but the twelve year period had not expired by then.

2. Oddity – there is an oddity in such a criminal possibly having the ability to exclude others from the residential building using the process of the Court. A trespasser is able in theory to rebuff an attempt at eviction by someone who does not have a better title. Such a trespasser has a defeasible fee simple. English law adopts a pragmatic approach and seeks to protect possession. Does the commission of the new offence preclude this by the application of the general principle that reliance can not be placed on an illegal act?

3. Adverse possession – the bringing into force of this new offence increases the significance of the issue as to whether title can be acquired based on possession which is illegal. The new regime in Schedule 6 of the Land Registration Act 2006 has reduced the scope for claims based on adverse possession but this may still be a material issue. In the principal textbook on the subject Stephen Jourdan Q.C. and Oliver Radley-Gardner contend that illegal possession is possession just the same as legal possession and should found a good claim for title. This proposition was not accepted by Judge Pelling Q.C. sitting as a judge of the High Court in R (on the application of Smith) v Land

Registry (Peterborough Office) [2009] EWHC 328 (Admin) ("the Caravan case") who applied the general principle that prevents reliance on an illegal act considering the House of Lords decision in Bakewell Management Limited v Brandwood [2004] UKHL 14 to be an exception which did not apply in the circumstances of that case.

3.1 The Caravan case – this is the most recent authority on the issue and at first instance the decision is emphatic. It involved an application to be registered at H.M. Land Registry as the owner of part of a public highway based on the applicant having for more than twelve years lived in a caravan placed there and having tended the surrounding hedges. One ground for rejecting the application was that the caravan constituted a wilful obstruction of the public highway and thus a criminal offence under section 137(1) Highways Act 1980. The illegality of the occupation meant that the applicant could not succeed because it would be contrary to the general principle that reliance cannot be placed on an illegal act but also because the applicant was not acting in the manner of an occupying owner as such an owner was not allowed to place a caravan there and live in it.

3.2 General principle – Judge Pelling Q.C. illustrated the general principle by reference to the Court of Appeal decision in Glamorgan CC v Carter [1963] 1 WLR 1 which concerned the illegal user of land as a caravan site. By way of defence reliance was placed on section 12(5)(c) of the Town and Country Planning Act 1947 which provided that planning permission was not needed in order to authorise the use of unoccupied land for the purpose for which it had been last used. It was held that although the last use was the illegal use as a caravan site this did not mean that section 12(5)(c) operated so that such user would now be legal. Salmon LJ stated at page 5 that "It seems to me plain on principle that Mrs James could not acquire any legal right by the illegal user to which she was putting the land."

This general principle is applied in the context of easements. It is not possible to acquire a prescriptive right "to do something the doing of which is prohibited by a public statute" (Lord Scott at para. 23 in the Bakewell Management case approving Neaverson v Peterborough RDC [1902] 1 Ch 557). So the illegal discharge of sewerage over a long period into a natural stream cannot convert the stream into a sewer and thereby remove the criminality (George Legge & Son Limited v Wenlock Corporation [1938] AC 204 applying Airdrie Magistrates v Lanark CC [1910] AC 286). The illegal abstraction of water from a millpond for a number of years did not confer a prescriptive right in Cargill v Gotts [1981] 1 WLR 441.

3.3 Bakewell Management Limited Brandwood supra - Reliance had been placed by the applicant in the Caravan case on the House of Lords decision in Bakewell Management Limited v Brandwood supra. Judge Pelling QC regarded that decision as the application of an exception to the general principle illustrated by Glamorgan CC v Cater supra. The decision in Bakewell Management had resolved the long running issue whether a right of way could be acquired over commons land by long user. Notwithstanding that the vehicular user in that case was a criminal offence under section 193(4) LPA 1925 this did not prevent the acquisition of a prescriptive right because consent could have been granted which would have removed the criminality. A valid grant of such a right of way could have been lawfully made. In contrast no such valid licence to occupy part of the public highway could be made and so the exception did not apply in the Caravan case.

That case went on appeal but the Court of Appeal decided it exclusively on the ground that it was not possible to acquire title to a public highway by adverse possession because a public highway

cannot cease to be a public highway other than in accordance with statute. The Court of Appeal side stepped this issue by indicating that it did not want to hear argument on the illegality point.

3.4 Earlier authorities – there is little authority on this issue. The criminal act of breaking into a property in order to acquire adverse possession has never been viewed as an objection to a claim to have acquired title based on adverse possession (Lambeth LBC v Blackburn [2001] EWCA Civ 91). In contrast illegal fencing to enclose common land has presented greater difficulty. In the short judgment of Younger J. in Collis v Amphlett (1917) 67 Sol Jo 37 it was held that adverse possession could not be claimed when reliance was placed on an enclosure which was contrary to section 36 Commons Act 1876. In contrast in the unreported decision of the Chief Commons Commissioner, Mr. Langdon-Davies, in re Plumstone Mountain Camrose Dyfed ref no. 272/U/105 he accepted the argument that the object of section 194 LPA 1925 was to prevent interference with access to the common and not to protect the landowner's title so that enclosure for more than twelve years extinguished title to the land enclosed but not the rights of common over that land. In Whitehurst v Dickinson ref/2008/0315 Stephen Jourdan Q.C. sitting as Deputy Adjudicator to HM Land Registry considered these two decisions but found that there was no statutory prohibition on enclosure on the facts of that case and so it was "unnecessary for me to decide whether Collis Amphlett and Re Plumstone Mountain Camrose can be reconciled and, if not, which is to be preferred, and to what extent I would be bound to follow the decision in the former case, as a decision of the High Court." When the enclosure is illegal and no person including the landowner has the power to make the encroachment lawful then Defra consider that the Courts may not endorse a claim based on adverse possession (para. 35 in Guidance Note on adverse possession of common land and town or village greens).

3.5 Retrospective acquisition – with the acquisition of prescriptive rights the long user leads to the inference that the user had a lawful origin. This is not possible with adverse possession claims because it would undo the very nature of the claim. The absence of the true owner's consent to possession is a crucial element in the claim. It would not only undo the criminality of the squatting in a residential building but equally would also undo the adverse character of the possession.

Twelve years adverse possession extinguishes all rights. It is not just the title which is lost but also the right to rents and mesne profits during any part of the twelve year period (re Jolly [1900] 2 Ch. 616 and Mount Carmel Investments Limited v Peter Thurlow Limited [1988] 1 WLR 1078). Does this combined with the possessor's defeasible title during that period justify an argument that once the twelve year period has expired the illegality of the possession is retrospectively removed?

In the Bakewell Management case Lord Walker stated at para. 59 that the "principle of legal certainty requires the criminality or lawfulness of an act to be determined at the time when it takes place, and not with the advantage (or disadvantage) of hindsight." However, in the context of section 193(4) LPA 1925 he did not consider that public interest required the absence of prior authority from the landowner to prevent the acquisition of a prescriptive right when such rights of that nature can be acquired by tortious acts. The unusual dispensing power with regard to the particular offence was in his judgment the key to the decision and would not apply to many other cases of criminal illegality.

The scope for argument is clear. On one side possession is possession whether or not illegal. On the other no claimant can build a case on criminal foundations. The decision of Judge Pelling QC in the

Caravan case is not on all fours because in that case there was no one who could lawfully licence the occupation of the land. He did not have to consider what would be the position if such ability existed as it would with a squatting case. To overcome the consequences of the successful application of the illegality argument with regard to vehicular access to houses over common land there was an Act of Parliament even before the House of Lords decision in Bakewell Management. The same pressures will not apply with criminal squatting in residential buildings and I would not expect a similar final outcome.